Supreme Court, U. S.
FILED
NOV 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-678

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The Supreme Court Of California

MOTION TO DISMISS APPEAL OR AFFIRM

JOHN W. WITT, City Attorney
C. ALAN SUMPTION, Deputy City Attorney
City Administration Building
202 "C" Street
San Diego, California 92101
Telephone: (714) 236-6220

Counsel for Appellees

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	2
LACK OF JURISDICTION	4
1. Appellant Does Not Contend That Legislation Is Repugnant To The Constitution .	5
2. The Open Space Plan Is Not A "Statute"	6
3. The Decision Appealed From Did Not Hold Legislation Valid	7
4. The Cases Cited By Appellant As Supporting Jurisdiction Are Inapposite Here.....	7
a. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 57 L.Ed.2d 631 (1978)	7
b. Moore v. East Cleveland, 431 U.S. 494, 52 L.Ed.2d 531 (1977).....	8
c. Goldblatt v. Town of Hempstead, 369 U.S. 590, 8 L.Ed.2d 130 (1962)	8
d. Euclid v. Ambler Realty Co., 272 U.S. 365, 71 L.Ed. 303 (1926)	8
e. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 67 L.Ed. 322 (1922)	9
THE JUDGMENT BELOW RESTS UPON AN ADEQUATE NONFEDERAL BASIS	9

TABLE OF CONTENTS (Continued)

	Page
THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION	10
1. The Decision Of The Court Of Appeal Is Not As Broad As Appellant Suggests	10
2. The Fifth Amendment Does Not Compel Damages As A Remedy For Exercises Of The Police Power Which Exceed Constitutional Limits	10
3. The Decision Below Is Not In Conflict With Federal Decisions	11
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Agins v. City of Tiburon
23 Cal.3d 605 (1979) 10

Armstrong v. United States
364 U.S. 40 (1960) 11

Berman v. Parker
348 U.S. 26 (1954) 11

Copperweld Steel Co. v. Industrial Com.
324 U.S. 780 (1944) 9

Euclid V. Ambler Realty Co.
272 U.S. 365 (1926) 8

Goldblatt v. Town of Hempstead
369 U.S. 590 (1962) 8

HFH, Ltd. v. Superior Court
15 Cal.3d 508 (1975)
cert. den. 425 U.S. 904 (1976) 6

Klopping v. City of Whittier
8 Cal.3d 39 (1972) 6

Lake Country Estates v. Tahoe Reg. Planning
___ U.S. ___, 59 L.Ed.2d 401 (1979) 11

Lathrop v. Donohue
367 U.S. 820 (1961) 6

Live Oak Water Users' Asso. v. Railroad Commission
269 U.S. 354 (1925) 7

TABLE OF AUTHORITIES (Continued)

Page

CASES (Continued)

Metcalf v. County of Los Angeles
24 Cal.2d 267 (1944) 9

Moore v. East Cleveland
431 U.S. 494 (1977) 8

Mountain View Chamber of Commerce v. City of Mountain View, 77 Cal.App.3d 82 (1978) 9

Penn Central Transp. Co. v. New York City
438 U.S. 104 (1978) 7

Pennsylvania Coal Co. v. Mahon
260 U.S. 393 (1922) 9,12

Pinheiro v. County of Marin
60 Cal.App.3d 323 (1976) 6

Richmond Elks Hall Assn. v. Richmond Redevelopment, 561 F.2d 1327 (9th Cir. 1977) 11

Selby Realty Co. v. City of San Buenaventura
10 Cal.3d 110 (1973) 6

United States v. O'Brien
391 U.S. 367 (1968) 6

Wilson v. Cook
327 U.S. 474 (1945) 7

TABLE OF AUTHORITIES (Continued)

Page

OTHER AUTHORITIES

California Government Code
Section 65700 3
Section 65803 3
Section 65910 3

Charter of The City of San Diego
Section 90 3

28 U.S.C. 1257(2) 4,6,7

42 U.S.C. 1983 11

United States Constitution
Fifth Amendment 11
Fourteenth Amendment 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-678

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The Supreme Court Of California

MOTION TO DISMISS APPEAL OR AFFIRM

Appellees move that the appeal herein taken be dismissed on the grounds that the United States Supreme Court does not hve jurisdiction under 28 U.S.C. 1257(2); the federal question sought to be reviewed was not expressly passed on; the judgment rests on an adequate nonfederal basis; and the appeal does not present a substantial federal question; or alternatively that the judgment be affirmed.

STATEMENT OF THE CASE

Appellant's statement of the case is misleading and inaccurate in numerous instances; however, for the most part, said inaccuracies relate to the merit of the issues and are irrelevant to the question of jurisdiction.

Appellees, therefore, will not burden this Honorable Court by making a full recital of the facts as supported by the record below, but will instead make brief references to, and correct some of the misstatements which relate to a proper perspective of the case.

The property which is the subject of this action is a drainage basin, tidal basin or flood plain, portions of which constitute an estuary and wildlife refuge and are within the California State Coastal Act Zone and subject to that act as to any development or use of said property (see Appellant's Appendix, G-2).

The property is vacant and unused except for some utility lines and appellant has never made application to appellee City of San Diego to use or improve it, nor has it asked the City what development might be permitted (Appellant's Appendix, G-4).

The Open Space Plan adopted by appellee City of San Diego as it related to appellant's property made specific comment that the open space designation did not preclude use of the property for a power plant.

There were never any zoning hearings to rezone appellant's property for "open space." The hearings appellant refers to were to rezone the property from industrial and agricultural zoning to agricultural or other appropriate zoning. As a result of those hearings, appellee City rezoned portions of the property from

industrial zoning to agricultural and from agricultural to another agricultural or "holding" zone. (Appellant's Appendix, G-2 and G-3.)

Appellee City of San Diego has no such zone as an "open-space" zone and appellant's reference to California Government Code, Section 65910 requiring adoption of an open space zone is expressly inapplicable to a charter city such as San Diego by California Government Code, Section 65803. Other California Government Code sections set forth in Appellant's Appendix, K-4 through K-7, are expressly inapplicable to a charter city unless adopted by charter or ordinance of the city, except for the requirements that a general plan containing the mandatory elements be adopted. California Government Code, Section 65700. (See Appellant's Appendix, B-5.)

No formal declaration of intent to condemn the subject property was ever made by appellee City of San Diego. The report entitled, "Staff Report, Park Reserve Systems, April 29, 1973," was a financing study of acquisition of open space lands expressly stating its purpose of ". . . establishing a broad guideline for possible future acquisition. . ." and that "It is not the intent, by creating this report with its attached tables and map, to specifically designate any particular property for acquisition. . . ."

The resolution included in Appellant's Appendix, K-8 and K-9, did not identify any specific properties and was adopted by appellee City solely to comply with San Diego City Charter, Section 90 relating to bonded indebtedness for purposes of presenting a ballot proposition to the electorate.

Appellant sought by its complaint money damages for a "taking or damaging" of its property and for a declaration that certain acts by appellee City were invalid and unconstitutional as unreasonable exercises of the police power.

In appealing the trial court judgment, appellees, in addition to raising errors of law, contended that material findings of fact made by the trial court were not supported by any substantial evidence.

LACK OF JURISDICTION

Appellant attempts to invoke the jurisdiction of this Court under 28 U.S.C. Section 1257(2), which provides in part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

It is abundantly clear from the decision below (Appellant's Appendix G), appellant's statement of the case and its framing of the questions presented that a state statute was not upheld upon an attack of being repugnant to the United States Constitution.

1. Appellant Does Not Contend That Legislation Is Repugnant To The Constitution

Appellant never contended below that a legislative enactment or enactments had the effect of violating its constitutional rights--rather it contended and the trial court found that a "continuing course of conduct," including rezoning, adoption of an open space plan, preparation and acceptance of open space financing plans, open space bond ballot propositions, etc., constituted a "taking" of its property. (Appellant's Appendix, A-2 through A-9.)

Throughout its jurisdictional statement appellant refers to the "actions" and "conduct" of appellees "taken as a whole" as having an unconstitutional effect upon its property rather than a particular legislative enactment or enactments.

Appellant has gone to great lengths throughout the trial and the appeals, including the statement of the case in its jurisdictional statement here, to cast this case in the light of illicit motive on the part of appellees to acquire its property for open space at a reduced value or to prevent any use of it so it would remain open space without acquisition by appellee City.

The testimony of appellant's witnesses at trial on the effect of the land use decisions complained of is clearly predicated upon their belief that said actions were undertaken with such an improper motive rather than upon the objective effect of the only two "legislative" actions involved (enactment of a zoning ordinance and adoption of an open sapce plan).

The law is clear that the motives of legislators in enacting legislation is irrelevant to the issue of constitutionality of the

legislation. *United States v. O'Brien*, 391 U.S. 367, 383, 20 L.Ed.2d 672 (1968). This rule is adhered to in California with the exception of unreasonable precondemnation conduct. *Pinheiro v. County of Marin*, 60 Cal.App.3d 323, 327-328 (1976). Said exception is not dependent upon the adopted legislation being invalid or unconstitutional--the remedy for such actions being recovery of damages in the eminent domain action. *Klopping v. City of Whittier*, 8 Cal.3d 39, 52 (1972).

Appellant's portrayal of this case as involving improper motives is also disclosed in its framing of the issues. In essence appellant seeks to punish a city for what it perceives as illicit motive and conduct, such being analogous to a tort theory under the guise of a constitutional "mandate." Such a contention was rejected in the case of *HFH, Ltd. v. Superior Court*, 15 Cal.3d 508, 518-519 (1975), cert. den. 425 U.S. 904, 47 L.Ed.2d 754 (1976).

2. The Open Space Plan Is Not A "Statute"

The term "statute" as used in 28 U.S.C. Section 1257(2) has been interpreted to mean "any enactment from whatever source originating, to which a State gives the force of law." *Lathrop v. Donohue*, 367 U.S. 820, 824, 6 L.Ed.2d 1191, 1195 (1961). The adoption of an open space plan by a city council resolution (Appellant's Appendix, K-10), while arguably an "enactment," does not have the force of law. *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 119-120 (1973); Appellant's Appendix, B-5.

3. The Decision Appealed From Did Not Hold Legislation Valid

The decision appealed from (Appellant's Appendix, G-1 through G-4) is the opinion of the Court of Appeal, Fourth Appellate District, Division One (the California Supreme Court denied hearing without opinion). Said opinion neither holds the zoning ordinance and general plan open space element valid nor invalid. Instead, it states that the assertions that appellee City arbitrarily exercised the police power by enacting an unconstitutional zoning law and general plan element or applying them unconstitutionally are disputed fact issues not covered by the trial court. (Appellant's Appendix, G-4).

In order for jurisdiction to lie under 28 U.S.C. 1257(2), the decision appealed from must have passed on the validity of the statute. *Wilson v. Cook,* 327 U.S. 474, 481, 90 L.Ed. 793 (1945). Something more than a claim of federal right is necessary; the attack must be upon the *validity* of the order, not merely upon the court's judgment. *Live Oak Water Users' Asso. v. Railroad Commission,* 269 U.S. 354, 357, 70 L.Ed. 305 (1925).

4. The Cases Cited By Appellant As Supporting Jurisdiction Are Inapposite Here

a. *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 57 L.Ed.2d 631 (1978).

In this case the trial court enjoined the city from enforcing landmarks legislation as being unconstitutional as applied. The highest state appellate court reversed the judgment. The Supreme Court addressed itself only to the question of the effect of the legislation which had been upheld below and did not

review the question of appropriate remedy were the legislation determined to have effected a constitutional "taking" of property.

b. *Moore v. East Cleveland*, 431 U.S. 494, 52 L.Ed.2d 531 (1977).

This case involved a criminal prosecution under an ordinance attacked as violative of Fourteenth Amendment due process. The ordinance was held valid by the state appellate court. There was no contention of appropriate remedy for a "taking" of property.

c. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 8 L.Ed.2d 130 (1962).

Here the state appellate court upheld the validity of an ordinance in an action to enjoin its enforcement as being violative of the Fourteenth Amendment. No issue of compensation as a remedy was raised.

d. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L.Ed. 303 (1926).

A U.S. District Court enjoined enforcement of a zoning ordinance as being unconstitutional and void. The issue before the Supreme Court was the validity of the ordinance.

e. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L.Ed. 322 (1922).

The State Supreme Court upheld a statute in an action to enjoin its enforcement. No issue of remedies was raised. The Supreme Court said the issue was how far the police power could go.

THE JUDGMENT BELOW RESTS UPON AN ADEQUATE NONFEDERAL BASIS

The issue of appellant's failure to exhaust its administrative remedies by applying for development permits on its property or relief from the land use restrictions as applied was raised by appellees at trial and throughout the appeal process.

It is clear in the Court of Appeal's opinion (Appellant's Appendix, G-4) that this fact was relied upon in reversing the judgment and denying appellant any relief. It is well settled law in California that the doctrine of exhaustion of administrative remedies applies to constitutional challenges of zoning ordinances. *Metcalf v. County of Los Angeles*, 24 Cal.2d 267 (1944); *Mountain View Chamber of Commerce v. City of Mountain View*, 77 Cal.App.3d 82, 93 (1978).

This Court should therefore dismiss this appeal as the decision is based upon state law rather than a federal question. *Copperweld Steel Co. v. Industrial Com.*, 324 U.S. 780, 785, 89 L.Ed. 1363 (1944).

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

1. The Decision Of The Court Of Appeal Here Is Not As Broad As Appellant Suggests

The decision below does not hold, as appellant contends, that a property owner may *never* recover money damages as a remedy for an unconstitutional exercise of the police power.

It merely states that such an exercise of the police power does not "require" compensation, citing the case of *Agins v. City of Tiburon,* 23 Cal.3d 605 (1979). This decision is obviously limited to the facts in this case. Among those facts are: Appellant's failure to apply for development of its property; that the property is not being used; that no actual or physical public use is being made of the property; that no formal actions were taken by the city to condemn the property; mere planning activities relating to *potential* acquisition were involved.

The Court of Appeal decision here, as well as the *Agins v. City of Tiburon, supra,* 24 Cal.3d 266, case did not disturb the line of cases involving unreasonable precondemnation conduct where money damages may be awarded. *Agins, supra,* at pp. 277-278.

2. The Fifth Amendment Does Not Compel Damages As A Remedy For Exercises Of The Police Power Which Exceed Constitutional Limits

The Supreme Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which,

in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49, 4 L.Ed.2d 1554 (1960).

The Fifth Amendment is a *prohibition* upon governmental excesses. Where legislation is involved, a declaration of invalidity or enjoining the application fulfills the constitutional purpose. It is not necessary to fulfill said purpose to transmute an *unlawful* exercise of the police power into the *lawful* taking of private property by the power of eminent domain thereby requiring a transfer of title and payment of fair market value as damages.

3. The Decision Below Is Not In Conflict With Federal Decisions

The *Lake Country Estates v. Tahoe Reg. Planning,* ____ U.S. ____, 59 L.Ed.2d 401 (1979) case involved a claim under the federal Civil Rights Act, 42 U.S.C. Section 1983, and the decision did not involve the issue of whether the constitution compelled money damages.

The case of *Richmond Elks Hall Assn. v. Richmond Redevelopment,* 561 F.2d 1327 (9th Cir. 1977) did not involve an exercise of the police power--it involved actions of a redevelopment agency possessing the power of eminent domain and relating to acquisition. The language in this opinion relating to the police power is obiter dictum. The decision also erroneously cites the case of *Berman v. Parker,* 348 U.S. 26, 99 L.Ed. 27 (1954) as a case holding that actions of the police power which effect a taking require payment of compensation. The *Berman* case involved a plaintiff seeking to *enjoin* the

condemnation of his property by contending the enabling legislation was for a private rather than public purpose. It was not a police power case.

The language appellant relies upon in *Pennsylvania Coal Co. v. Mahon, supra,* 260 U.S. 393, 67 L.Ed. 322, is likewise dicta in that the action involved an injunction, not inverse condemnation. Furthermore, the court's statement that there must be an exercise of eminent domain to *sustain* the act certainly implies a contrary result where the act is invalidated.

CONCLUSION

Appellant seeks this Court to grant jurisdiction in order to argue issues of federal rights where said rights were not the basis of the decision below, where no substantial federal question is involved, and where no statute has been adjudged valid below.

This appeal should be dismissed or the decision below affirmed.

Dated: November 27, 1979

Respectfully submitted,

JOHN W. WITT, City Attorney

By C. Alan Sumption
C. Alan Sumption, Deputy

Counsel for Appellees